

**KENTUCKY PERSONNEL BOARD
MINUTES OF SEPTEMBER 13, 2019**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chair Crall on September 13, 2019, at approximately 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky.

Board Personnel Present:

Brian J. Crall, Chair
Mark O. Haines, Vice Chair
Beverly H. Griffith, Member
William J. Byrley, Member
Catherine J. Monteiro, Member
Tanya Lawrence, Member
Mark A. Sipek, Executive Director and Secretary
Stafford Easterling, General Counsel
Cynthia Perkins, Administrative Section Supervisor
Gwen McDonald, Administrative Specialist

(Richard Waite was not present pending his status as a Board member being resolved.)

2. **READING OF THE MINUTES OF THE REGULAR MEETING HELD AUGUST 9, 2019.**

The minutes of the last Board meeting had been previously circulated among the members. Chair Crall asked for any additions or corrections. Ms. Monteiro moved to approve the minutes as submitted. Ms. Griffith seconded and the motion carried 5-0. The Board members signed the minutes.

(Chair Crall does not vote, unless noted.)

3. **EXECUTIVE DIRECTOR AND SECRETARY'S REPORT**

Mr. Sipek informed the Board that the matter of Stephen Knipper vs. Governor's Office, et al., Appeal No. 2019-037, has been continued generally and would not be before the Board at this meeting.

Mr. Sipek addressed the request for information received from the Personnel Cabinet. The response is being drafted and Mr. Sipek looks forward to an ongoing dialogue about this with the Cabinet and other agencies.

Mr. Sipek stated that staff would be looking at the regulations to amend and clean up some language.

Mr. Sipek updated the Board in regards to Richard Waite's situation. Mr. Waite is an elected Board member who has retired but wants to continue on the Board. Mr. Easterling filed a declaratory action in Franklin Circuit Court to advise the Board whether such is possible, given the ambiguous language in the statutes and regulations. A hearing is scheduled for September 17, 2019, in Franklin Circuit Court, and our hope is to have a decision well in advance of the October Board meeting.

Lastly, Mr. Sipek stated he would be attending the Conference on Leadership and Diversity in the next week.

4. REPORT OF THE PERSONNEL CABINET

Secretary Tom Stephens reported the 2019 Conference on Leadership and Diversity was sold out.

Open enrollment for health insurance benefits begins October 14, 2019, and runs through October 30, 2019. Statewide benefit fairs begin on September 30, 2019, and participants are able to receive free flu shots, in addition to valuable information regarding health, vision, dental, life insurance, and other benefits. Open enrollment may be available to members at the benefit fairs.

Secretary Stephens also reported that the Go365 program is being discontinued this year. A new provider, Staywell, has been selected, and will offer similar activity points and benefits for its members who chose to participate, in addition to new activities such as mindfulness, spirituality, and financial wellbeing. Go365 members have until November 30, 2019, to use their points. No points will roll over to the next year in the Staywell plan. More information will be forthcoming about this program soon.

Lastly, Secretary Stephens was pleased to announce that a locality pay premium has been approved for some positions in some localities statewide and will begin with the September 16, 2019 pay period. A premium of \$2.64 will be paid to certain Department of Corrections' employees in Oldham and Shelby Counties, making it easier for the state to employ and retain employees in those competitive markets.

5. **ORAL ARGUMENTS**

A. **Amanda Parmley v. Transportation Cabinet (Appellant's request)(Deferred from August)**

Present for oral arguments were the Hon. JoEllen McComb, counsel for Appellant, and the Hon. William Fogle, counsel for the Appellee, Transportation Cabinet. The parties answered questions from the Board.

B. **Heather Damron v. Labor Cabinet (Appellee's request)**

Present for oral arguments were the Appellant, Heather Damron, and the Hon. Kate Bennett, counsel for the Appellee, Labor Cabinet. The parties answered questions from the Board.

C. **Rhonda L. Kiper v. Labor Cabinet (Appellee's request)**

Present for oral arguments were the Appellant, Rhonda L. Kiper, and the Hon. Kate Bennett, counsel for the Appellee, Labor Cabinet. The parties answered questions from the Board.

D. **Mia Phillips v. Justice and Public Safety Cabinet/DJJ (Appellant's request)**

Present for oral arguments were the Appellant, Mia Phillips, and the Hon. Jamhal Woolridge, counsel for the Appellee, Justice and Public Safety Cabinet, Department of Juvenile Justice.

6. **MOTIONS**

A. **Denise Gore v. Tourism, Arts and Heritage Cabinet**

- Appellant's Exceptions and Request for Oral Argument (returned as untimely)
- Appellee's Response to Appellant's Delinquent Filings
- Appellant's Motion for Consideration of Objections to Hearing Officer's Recommended Order

Neither of the parties were present, nor did they request to present to the Board. Mr. Sipek clarified the law regarding exceptions and extensions of time for the Board. Chair Crall stated that, for the purpose of the motion, the Board would take the matter up in closed session.

Mr. Haines, having considered the record (with Appellant's exceptions and request for oral argument having been returned as untimely), including Appellee's response to Appellant's delinquent filings, and Appellant's motion for consideration of objections to hearing officer's recommended order, moved that the Board deny consideration of Appellant's objections to the recommended order. Ms. Monteiro seconded and the motion carried 5-0.

B. **Adrienne Southworth v. Governor's Office & Office of Lt. Governor**

- Governor's Office Motion for the Personnel Board to Hear the Appeal in This Matter and to Hold This Matter in Abeyance Pending the Board's Determination in Appeal No. 2019-037
 - Appellant's Motion to Strike
 - Appellant's Response to Motion for Board to Hear Appeal; Hold in Abeyance; Amended Motion to Strike and Motion to Amend August 6, 2019 Order
- Moved from August**

The Appellant, Adrienne Southworth, counsel for the Governor's Office, the Hon. Carmine Iaccarino, and counsel for the Lt. Governor's Office, the Hon. Joshua Harp, were present. The parties answered questions from the Board.

Mr. Sipek opined there was some miscommunication as to who the parties are in this matter at the beginning when the appeal was filed.

Chair Crall commended the parties on their respective pleadings, stating they were very well written. He noticed some assertions had been made by the parties and cautioned the parties about making baseless or gratuitous assertions. All motions were heard by the Board. Chair Crall noted the Board would take these motions up in closed session.

Ms. Monteiro, having considered the record, moved that the Board deny the Governor's Office's Motion for the Personnel Board to Hear the Appeal in this Matter and assign this

matter to a hearing officer for further adjudication. Mr. Byrley seconded and the motion carried 4-1, with Mr. Haines opposing.

7. REVIEW OF INTERIM ORDER – ORAL ARGUMENT

- A. ~~Stephen Knipper v. Governor's Office (Appeal No. 2019-037)~~
~~--Appellee's Response to July 3, 2019 Interim Order~~
~~--Appellant's Response to July 3, 2019 Interim Order~~
~~--Appellee's Reply to Appellant's Response~~
~~--Appellant's Reply to Appellee's Response~~
~~--Lt. Governor's Office, Entry of Appearance and Provisional Petition~~
~~--for Intervention and Motion for Continuance~~
~~--Memorandum in Further Support of the Lieutenant Governor's Office~~
~~--Provisional Petition to Intervene and Motion for Continuance~~
~~--Lt. Governor's Office Supplemental Memorandum~~
~~--Appellee's Response to Lt. Governor's Provisional Petition to Intervene and~~
~~--Motion for Continuance~~
~~--Lt. Governor's Office Response to July 3, 2019 Interim Order~~
~~--Appellant's Reply to Lt. Governor's Response to July 3, 2019 Interim Order~~
Deferred to September Board
Continued Generally

8. CLOSED SESSION/RETURN TO OPEN SESSION

Ms. Monteiro moved that the Board go into Executive Session for the purposes of discussing complaints and deliberations regarding individual adjudications. Ms. Lawrence seconded. Chair Crall stated that a motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. [Pursuant to KRS 61.810(1)(j), the Kentucky Open Meetings Act, the Board retired into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action were as follows, because there were deliberations regarding individual adjudications as listed on the Board's Agenda for the September 13, 2019 meeting.] (11:54 a.m.)

Mr. Haines moved to return to open session. Ms. Griffith seconded and the motion passed by acclamation. (2:00 p.m.)

9. **CASES TO BE DECIDED**

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments, where applicable.

- A. **Michael L. Frost (Withdrawn)**
Curtis Mckiddy (Appeal No. 2015-145),
Don Nolan (Appeal No. 2015-147),
Craig A. Napier (Appeal No. 2015-153),
Roy G. Allen (Appeal No. 2015-154),
Robbie D. Hatcher (Appeal No. 2015-155),
Shannon R. Smith (Appeal No. 2015-157),
Gene S. Gregory (Appeal No. 2015-160),
Jeffrey A. Crowder (Appeal No. 2015-159),
John R. Farmer (Appeal No. 2015-144),
Patrick Fitzgerald (Appeal No. 2015-243),
Christopher Cox (Appeal No. 2015-245), and
Charles Childress (Appeal No. 2015-247) v. Transportation Cabinet and
Personnel Cabinet (12 Appeals)

Ms. Monteiro, having considered the record, including Appellants' exceptions and request for oral argument, Personnel Cabinet's exceptions, Appellants' response to Personnel Cabinet's exceptions, Personnel Cabinet's response to Appellants' exceptions, and oral arguments, moved to accept the Final Order Sustaining the Hearing Officer's Findings of Facts, Conclusions of Law, and Recommended Order as Altered and as attached to the minutes. Ms. Griffith seconded and the motion carried 4-0. Ms. Lawrence abstained.

- B. **Amanda Parmley v. Transportation Cabinet (2017-234)**

Mr. Byrley moved to defer this matter to the next Board meeting. Ms. Monteiro seconded and the motion carried 5-0.

- C. **Heather Damron v. Labor Cabinet (2018-030)**

Ms. Griffith, having considered the record, including Appellee's exceptions and request for oral argument, Appellant's response, and oral arguments, moved to accept the recommended order sustaining the appeal to the extent therein. Mr. Byrley seconded and the motion carried 3-2, with Ms. Lawrence and Ms. Monteiro opposing.

D. Rhonda L. Kiper v. Labor Cabinet (2018-005)

Ms. Griffith moved to defer this matter to the next Board meeting. Ms. Monteiro seconded and the motion carried 5-0.

E. Denise Gore v. Tourism, Arts and Heritage Cabinet/Parks (2018-011)

Mr. Haines, having considered the record, moved to accept the recommended order dismissing the appeal. Ms. Lawrence seconded and the motion carried 5-0.

F. Kenya Mosley v. Department of Veterans Affairs (2018-200)

Mr. Haines, having considered the record, moved to accept the recommended order dismissing the appeal. Ms. Griffith seconded and the motion carried 5-0.

Show Cause Orders – No Response Filed – Appeals Dismissed

G. Orlando Jones v. Justice and Public Safety Cabinet/Corrections (2019-047)

H. Angela Rogers v. Justice and Public Safety Cabinet/Corrections (2018-177)

I. Warren Webb v. Justice and Public Safety Cabinet/Corrections (2017-232)

Ms. Monteiro moved to accept the recommended orders and to dismiss the appeals for failure to prosecute the appeals. Ms. Lawrence seconded and the motion carried 5-0.

Show Cause Order –Response Filed – Appeal Dismissed

J. Mia Phillips v. Justice and Public Safety Cabinet/DJJ (2019-028)

--Appellant's Exceptions and Request for Oral Argument

Mr. Byrley, having considered the record, including Appellant's exceptions and request for oral argument, and oral arguments, moved to accept the recommended order and to dismiss the appeal for failure to prosecute the appeal. Ms. Lawrence seconded and the motion carried 5-0.

10. **WITHDRAWALS**

Ms. Griffith moved to accept the following withdrawals *en bloc* and to dismiss the appeals. Mr. Haines seconded and the motion carried 5-0, with Ms. Lawrence abstaining from Items B, D, E, and G.

- A. Lloyd Fetzer v. Cabinet for Health and Family Services (2019-012 & 2019-085) (2 appeals)
- B. Eugenia Fowler v. Personnel Cabinet (2019-061)
- C. John Gibbs v. Justice and Public Safety Cabinet/Corrections (2019-067)
- D. Holly Green v. Personnel Cabinet (2019-150)
- E. Tracie Mauer v. Personnel Cabinet (2019-158)
- F. Tara Reil v. Transportation Cabinet (2019-101)
- G. Andrea Sapp v. Cabinet for Health and Family Services & Personnel Cabinet (2019-138)
- H. Jessica Little v. Justice and Public Safety Cabinet/Corrections (2019-114)

11. **SETTLEMENTS**

Ms. Griffith moved to issue settlement orders and to sustain the appeals *en bloc* to the extent set forth in the settlements as submitted by the parties. Ms. Monteiro seconded and the motion carried 5-0.

- A. Deborah Harris v. Cabinet for Health and Family Services (2019-026) (Mediation)
- B. Donald Jones v. Tourism, Arts & Heritage Cabinet/Parks (2018-100) (Mediation)
- C. Gregory Leist v. Justice and Public Safety Cabinet/Corrections (2019-122)
- D. Curtis McKiddy v. Transportation Cabinet (2019-044)
- E. Sydnee Penn v. Justice and Public Safety Cabinet/Juvenile Justice (2019-024)
- F. Angela Stewart v. Public Protection Cabinet (2019-053) (Mediation)
- G. Mary Beth Farmer v. Cabinet for Health and Family Services (2019-097) (Mediation)

12. **OTHER**

Mr. Sipek discussed an email from Secretary Stephens with a list of questions regarding the appeal and hearing process. Mr. Sipek and Mr. Easterling will respond to the request. Mr. Sipek stated the response to the questions would be put on the website so it would be available to interested agencies.

Mr. Sipek also updated the Board on Board of Elections/Secretary of State investigation, which has been delayed due to other matters. Chair Crall requested the investigation be advanced as quickly as possible.

Mr. Sipek related there was no further word on the Personnel Cabinet's investigation regarding Dylan Gorski. The appeal has been assigned to a hearing officer for further adjudication.

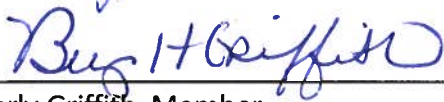
There being no further business, Mr. Haines moved to adjourn the meeting. Ms. Monteiro seconded and the motion passed by acclamation. (2:15 p.m.)



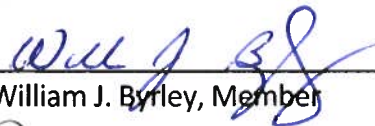
Brian J. Crall, Chair



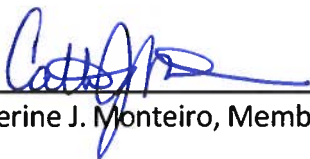
Mark O. Haines, Vice Chair



Beverly Griffith, Member



William J. Byrley, Member



Catherine J. Monteiro, Member



Tanya Lawrence, Member

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**MICHAEL L. FROST (APPEAL NO. 2015-143) (WITHDRAWN)
CURTIS McKIDDY (APPEAL NO. 2015-145)
DON NOLAN (APPEAL NO. 2015-147)
CRAIG A. NAPIER (APPEAL NO. 2015-153)
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PATRICK FITZGERALD (APPEAL NO. 2015-243)
CHRISTOPHER COX (APPEAL NO. 2015-245)
CHARLES CHILDRESS (APPEAL NO. 2015-247)**

APPELLANTS

**VS. FINAL ORDER SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER AS ALTERED**

TRANSPORTATION CABINET

AND

PERSONNEL CABINET

APPELLEES

* * * * *

The Board, at its regular September 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated July 11, 2019, Appellants' Exceptions and Request for Oral Argument, Appellee Personnel Cabinet's Exceptions, Appellants' Response to Personnel Cabinet's Exceptions, Personnel Cabinet's Response to Appellants' Exceptions, oral arguments, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Statement of the Case, paragraph 2, and substitute the following:

2. In 2015, the Transportation Cabinet filled vacancies for three TET II positions and two TET III positions in five different counties under a process utilized by the Personnel Cabinet referred to as "Resign to Reappoint," resulting in similarly classified workers within those counties also receiving a pay increase. These appeals were filed in 2015 by workers within those classifications who were not in the applicable counties and did not receive the pay adjustment. The appeals were consolidated for purposes of grouping the appeals together and the Personnel Cabinet was included as a party. (Personnel Board Interim Order, November 6, 2015.)

B. **Delete** Summary of Evidentiary Testimony, paragraph 12, and substitute the following:

12. Bailey testified that "reappoint" is a term used by the Personnel Cabinet and is actually an "appointment." She testified that, even though the term "reappoint" is not contained in the statute, it is the policy of the Personnel Cabinet that "appoint/reappoint" are the same thing, although there is no statute that states this. Further, the statutes and regulations provide no preference for the hiring method to be used. She stated that KRS 18A.0751(4)(f) does not require a preference and that the agency has the discretion to use whatever process it deems appropriate. She further said that the administrative regulation at 101 KAR 2:076, which establishes the requirements for filling a vacancy, does not give an order of preference, guidance, or detailed procedure to the agencies, and that the decision-maker or appointing authority has complete discretion to use any available procedure. She stated that when a hiring manager requests that a job opening be placed on the register, he or she has complete discretion to state the hiring process desired. She further stated that an "Internal Mobility Applicant" refers to a

classified state employee with status who is applying for another position within state government. An agency may choose to request a “promotional register” that includes only internal mobility candidates for consideration, as opposed to “someone who walks in off the street.” (Testimony of Mary Elizabeth Bailey, 11/15/18, 10:50:45-10:52:55.)

C. **Add** Summary of Evidentiary Testimony, paragraph 34, as follows:

34. **J. R. Dobner** testified that personnel records for 2015 were used to compare salaries to identify employees who should receive salary increases based on the resign/reappoint actions of Noble, Kessinger, and Walton. Mr. Dobner testified there were no spreadsheets or other documentation available to demonstrate how these individuals were compared for salary increase purposes.

D. **Delete** Findings of Fact, paragraph 1, subparagraph (2), and substitute the following:

(2) The five Resign to Reappoint actions at issue in this appeal were filled by the following:

APPOINTEE	WORK COUNTY	POSITION	DATE OF APPOINTMENT
Phillip Noble	Breathitt	TET II	March 1, 2015
Melissa Kessinger	Warren	TET II	May 16, 2015
John Edwards	Hardin	TET II	November 1, 2015
Heather Walton	Boone	TET III	March 1, 2015
Stephen Lanham	Powell	TET III	November 16, 2015

E. **Delete** Finding of Fact, paragraph 1, subparagraph (4), and substitute the following:

(4) The Personnel Action Notification (PAN) forms for each of the 5 Resign to Reappoint actions reflect the "action type" as "Resign to Reappoint."

F. **Delete** Findings of Fact, paragraphs 3 and 4, and substitute the following:

3. The application process utilized by the Transportation Cabinet in this case with the five vacancies at issue followed the statutory and regulatory requirements for the promotion criteria to be considered in the selection process, even though the placements were made through a "Resign to Reappoint" recommendation from the Chief District Engineer.

4. The issue of salary increases from a vacancy filled by "appointment" is governed by 101 KAR 2:034, Section 1, which provides that an appointment of a new employee be at a salary not to exceed the midpoint of the pay grade, and that an adjustment be made to that salary of an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee: (a) is in the same job classification; (b) is in the same work county; and (c) has a similar combination of education and experience relating to the relevant job class specification. If the placement is by promotion, none of the other incumbent employees similarly situated will receive an increase in salary.

F. **Delete** Conclusions of Law, paragraph 14. and substitute the following:

14. The uncontradicted testimony from Mary Elizabeth Bailey, Commissioner of the Department of Human Resources Administration in the

Personnel Cabinet, is that this procedure has been used before. However, it is the call of the District Highway Engineer to select the hiring process to be followed, although the Human Resources Management office reviews all the information on the job placement request and may comment on the procedure selected. She said that the Personnel Cabinet had no problem with the "Resign to Reappoint" procedure, that the request for "Resign to Reappoint" has been a long standing policy within the Personnel Cabinet, that there have been over 5,000 "Resign to Reappoint" hirings within the state agencies, and that the procedure is consistent with the regulations. Bailey also pointed out KRS 18A.0751(4)(f) provides that promotions are to be made in the best interest of the service, and that it is up to the agency to determine the practicality of the process used. Finally, she testified that all appointments go on a probationary status in their new position.

H. **Delete** the Recommended Order, and substitute the following:

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing Findings of Fact and Conclusions of Law, the Personnel Board enters an Order that the appeals of **MICHAEL L. FROST (APPEAL NO. 2015-143) (WITHDRAWN), CURTIS McKIDDY (APPEAL NO. 2015-145), DON NOLAN (APPEAL NO. 2015-147), CRAIG A. NAPIER (APPEAL NO. 2015-153), ROY G. ALLEN (APPEAL NO. 2015-154), ROBBIE D. HATCHER (APPEAL NO. 2015-155), SHANNON R. SMITH (APPEAL NO. 2015-157), GENE S. GREGORY (APPEAL NO. 2015-160), JEFFREY A. CROWDER (APPEAL NO. 2015-159), JOHN R. FARMER (APPEAL NO. 2015-144), PATRICK FITZGERALD (APPEAL NO. 2015-243), CHRISTOPHER COX (APPEAL NO. 2015-245) and CHARLES CHILDRESS (APPEAL NO. 2015-247) be**

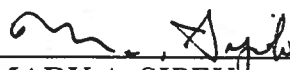
DISMISSED and that said appeals be removed from the docket, as it is the conclusion of the Board that the "Resign to Reappoint" personnel actions at issue herein met the statutory and regulatory requirements of the Commonwealth of Kentucky.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered, are approved, adopted and incorporated herein by reference as a part of this Order, and Appellants' appeals are **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of September, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Edwin Logan
Hon. Catherine Stevens
Hon. Richard Guarnieri
Hon. Paul Fauri
Mr. J. R. Dobner

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD**

**MICHAEL L. FROST (APPEAL NO. 2015-143) (WITHDRAWN)
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APPELLANTS

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

TRANSPORTATION CABINET

AND

PERSONNEL CABINET

APPELLEES

*** **

The consolidated appeals came on for an evidentiary hearing on November 14 and 15, 2018, and December 4, 2018, before E. Patrick Moores, Hearing Officer, at the offices of the Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellants McKiddy, Nolan, Napier, Allen, Hatcher, Smith, Gregory, Crowder, and Farmer were present and represented by the Hon. Richard M. Guarnieri of Frankfort, Kentucky. The Appellants Childress, Cox, and Fitzgerald were present and represented by the Hon. Paul F. Fauri of Frankfort, Kentucky. The Appellee, Transportation Cabinet, was present and represented by Hon. Edwin A. Logan of Frankfort, Kentucky, and the Appellee, Personnel Cabinet, was present and represented by Hon. Catherine M. Stevens of the Cabinet's Office of Legal Services in Frankfort.

This matter involves consolidated appeals filed by the above named Appellants. The Appellants charged that the Transportation Cabinet improperly utilized a system referred to as "Resign to Reappoint" without statutory or regulatory authorization in order to promote Transportation Engineering Technologists IIs and Transportation Engineering Technologist IIIs (TET IIs and TET IIIs) who were not included in salary advancements instituted by the Transportation Cabinet and approved by the Personnel Cabinet in 2015 in several counties. The Appellants argue that these actions resulted in pay increases to similarly situated employees in different work counties, that the Appellants were penalized when they were denied pay raises granted to the other state employees, and that the actions taken by the Appellees were arbitrary.

I. STATEMENT OF THE CASE

1. In 2014, the Kentucky General Assembly enacted HB 236 directing the Transportation and Personnel Cabinets to conduct a salary study and develop a plan to revise Transportation Engineering salaries in order to allow the Transportation Cabinet to become competitive with state transportation engineering studies in surrounding states and private entities. The Personnel Cabinet, Department of Human Resources Administration, in conjunction with the Transportation Cabinet, Office of Human Resource Management, conducted the research and survey, which was published on January 8, 2015. ("Transportation Engineering Series Salary Study," Executive Summary, page 3, Appellee Exhibit 4; Joint Agreed Stipulation, paragraph 17.) As a result of the survey, an across the board salary increase was given to various highway engineering classifications, including Transportation Engineering Technologist Is, however, it was alleged that TET IIs and TET IIIs were excluded.
2. In 2014 and 2015, numerous promotions to the position of TET IIs and TET IIIs were made within the Transportation Cabinet under a process utilized by the Personnel Cabinet referred to as "Resign to Reappoint" resulting in similar classified workers within those counties also receiving a pay increase. These appeals were filed in 2015 by workers within those classifications who were not in the applicable counties and did not receive the pay adjustment. The appeals were consolidated for purposes of grouping the appeals together and the Personnel Cabinet was included as a party. (Personnel Board Interim Order, November 6, 2015.)
3. Appellant Michael Frost was dismissed from the consolidated appeals by final order entered on February 14, 2017. Over the course of the following year-and-a-half, the parties responded to discovery requests and the Appellee Cabinets filed a Joint Motion to Dismiss on May 12, 2017, which the Personnel Board denied on May 7, 2018, finding that a genuine issue of material fact existed in the appeals. The Appellees also argued the appeals should be dismissed because the Appellants had no legal standing as they did not apply for the positions posted, an argument that the Personnel Board Hearing Officer also denied.

4. A pre-hearing conference was held before the Personnel Board on June 20, 2018, following which an Interim Order was issued scheduling the matter for an evidentiary hearing November 14 - 16, 2018. Another pre-hearing conference was conducted on September 25, 2018, at which the severing of the appeals of Miller, Nolan, and Roberts was affirmed and the appeal of Weaver was withdrawn.

5. The evidentiary hearing began on November 14, 2018, commencing at 9:45 a.m., local time, and continued on November 15, 2018, and was thereafter continued to December 4, 2018. At issue to be proven by the Appellee Transportation and Personnel Cabinets was whether the Cabinets complied with the provisions of KRS 18A.0751(4)(f) and 101 KAR 2:034(1) in selecting the persons appointed to the TET IIs and TET IIIs positions and whether the Appellants were improperly denied salary adjustments. At issue to be proven by the Appellants was whether the Cabinets' "Resign to Reappoint" procedure in their personnel actions was improper and unauthorized under Kentucky law. The burden of proof on all issues was by a preponderance of the evidence. At the conclusion of the presentation of all evidence, the attorneys for the parties agreed they desired the opportunity to submit legal briefs presenting their arguments on the evidence and the law on the matter, they were given 60 days to simultaneously submit their Post Hearing Briefs and 30 days thereafter to simultaneously submit their Reply briefs. By agreement, the briefing schedule was subsequently extended to March 4, 2019, and April 8, 2019, and, upon the filing of the briefs, the matter was then submitted on the record.

II. SUMMARY OF EVIDENTIARY TESTIMONY

1. The first witness was Jolene Parris, Executive Director of the Office of Human Resources Management for the Transportation Cabinet. She testified that she was a staff assistant in 2015 and became Executive Director of the Human Resources Management in March 2016. She described her duties as tracking personnel matters in the twelve highway districts in the Commonwealth of Kentucky, working with the Chief District Engineer in each district. Parris testified that her involvement in the promotions in issue was in the processing of the requests for the promotions.

2. Parris testified that in August 2014, Tracy Young, the appointing authority for District 10, submitted a request that a TET II position be established and filled and the request was forwarded to Human Resources management, where the request was subsequently approved. She stated that once the request goes through the approval process, the job would be posted as being available and that anyone could apply for the position. She stated that the District office decides the people to be considered and interviewed for the position and that the Personnel Cabinet decides their eligibility to be selected. Phillip Noble, who is a current classified employee with the state, was the person selected for the job opening and submitted by the Chief District Engineer as being approved to be placed in the TET II position.

3. Parris testified that the application process followed the statutory and regulatory requirements for the promotion criteria to be considered in the selection process, even though the placement was made through a "Resign to Reappoint" recommendation from the District 10 Chief Engineer. She testified that she has seen this procedure used before for other promotions; however, it is the call of the District Highway Engineer to select the hiring process to be followed. She acknowledged that the Human Resources Management office reviews all the information on the job placement request and may comment on the procedure requested and being followed. She said that the state office had no problem with the "Resign to Reappoint" procedure, and that the request was also approved by the Commissioner. She testified that the appointment procedure was consistent with the promotional placement request.

4. Parris testified that the Internal Mobility Applicant form submitted on behalf of Mr. Noble is used by employees already in the classification system and discloses the applicant's training and work experience unique to the position. An employee not employed in the classification system is unable to fill out or sign one of the forms. Concerning the salary for the job classification, the State Highway Engineer is not involved as that decision falls within the jurisdiction of the Personnel Cabinet. She stated that if Noble was "promoted," no other employees would have received a pay increase. She produced documentation identifying the individuals who received a pay increase as a result of Noble's appointment.

5. Parris testified that in 2015 Jennifer White, an Administrative Specialist for the District 3 office, was the person involved in processing the personnel paperwork for that District's request for the appointment on the job opening for the office in Bowling Green, and that Carol Beth Martin was the appointing authority. She testified that the vacancy was initially opened as "competitive," which made it open to all candidates, and that she was not involved in any of the discussions concerning the opening. She testified that the documentation disclosed that Melissa Kessinger was the only "classified" employee that applied for the position. She said that Greg Meredith was the District 3 Chief Engineer and that he sent a memo requesting that Kessinger be hired under the "Resign to Reappoint" method at a Grade 14 salary increase. She testified that if Kessinger had been placed in the position as a "promotion," she would have only received a 10% increase and that none of the other TET II employees in the county would have received a pay increase. She testified that the hiring process and pay is done at the discretion of the hiring manager in the District, and that the documentation was processed through the department with approval at every step in the process.

6. Parris testified concerning the job opening posted in 2015 for a TET II in Hardin County, which was listed on the "competitive" register, thereby open to all candidates including "outside" employees. She said the record showed that four applicants met the minimum qualifications for the position, which was awarded to John Edwards as an "appointment," and that four employees in Hardin County received pay increases as a result of the appointment of Edwards. She stated that the criteria requirements for promotions were followed in making the appointment.

7. Parris testified concerning the posting of a job opening for a TET III position in the office in Florence, Kentucky, which was posted on the "competitive" register for Boone County, and was open to all classified and outside employees. She stated that the documentation revealed that 12 applicants met the qualifications for the position, which was awarded to Heather Walton. Parris testified that the request for the hiring process was made by Robert Haus, Chief Engineer for District 6, who, as the hiring manager, has the discretion to make the call as to the hiring process. She testified that the position was initially submitted as a "promote," but that "someone" scratched out "promote" and changed the recommendation to a "Resign to Reappoint" request. Parris said she had no idea who decided or how it was decided that the request for the method of the hiring process was changed, or why it was changed.

8. Parris testified concerning the posting of an opening for TET II position in Powell County, which was awarded to Stephen Lanham. The job opening was initially listed as an "appointment," but was changed to a "Resign to Reappoint," which was approved.

9. Parris testified that there was no statewide mandate concerning the hiring process to be followed and that it falls within the discretion of each district hiring manager based on need, and that when the discretion is exercised it is applied to the specific individual considered. She further said the Cabinet had no authority to make any promises concerning pay increases, which has to be approved by the Personnel Cabinet, which receives the documentation from the office of Human Resources Management of what the hiring appointment is and the authority for the job placement.

10. Mary Elizabeth Bailey is the Commissioner of the Department of Human Resources Administration in the Personnel Cabinet. She stated that her duty is to make sure her department complies with the personnel statutes and regulations. She testified that when an agency creates or establishes a position it has guidelines to be followed. When a request is posted, the Personnel Cabinet does a minimum qualification review of the candidates applying for the position. The Personnel Cabinet notifies the agency as to who is eligible to be considered and which applicants should be removed due to lack of qualifications or prior administrative action against the applicant, denying that person the availability of consideration. The agency decides if the position is to be designated as "competitive" or "promotional." The agency also decides which of the qualified applicants are to be interviewed, and the Personnel Cabinet is not involved in the determination of which candidate is selected to fill the position. She said that the minimum qualifications review considered the applicant's education and experience for the job classification.

11. Bailey testified that there is a variety of "systems" available for personnel decisions, which depends on the level of employment action wanted. She testified that a position filled by "Resign to Reappoint" requires that a resignation be executed by the candidate, that the minimum requirements for the position are met, the salary requested in the new position is not above the "mid-point," that there is no administrative action denying the employee the opportunity for the position. She stated that the agency is notified that it should comply with the

compensation requirements, but that the Personnel Cabinet is not involved in the review process. The agency does its own review and determines what salaries are impacted and to be increased.

12. Bailey testified that "reappoint" is a term used by the Personnel Cabinet, and is actually an "appointment." She testified that even though the term "reappoint" is not contained in the statute, it is the policy of the Personnel Cabinet that "appoint/reappoint" are the same thing, although there is no statute that states this. Further, the statutes and regulations provide no preference for the hiring method to be used. She stated that KRS 18A.0751(4)(f) does not require a preference and that the agency has the discretion to use whatever process it deems appropriate. She further said that the administrative regulation at 101 KAR 2:076, which establishes the requirements for filling a vacancy, does not give an order of preference, guidance, or detailed procedure to the agencies, and that the decision-maker or appointing authority has complete discretion to use any available procedure. She stated that when the hiring manager requests that a job opening be placed on the register, he has complete discretion to state the hiring process desired. She further stated that an Internal Mobility Applicant refers to a classified state employee with status, which restricts consideration to already qualified state employees and "not someone who walks in off the street."

13. Bailey testified that on a "Resign to Reappoint" requisition, all the Personnel Cabinet receives is the resignation letter. She stated that "reappoint" meant the employee was resigning to be reappointed to a position and that there was no break in service from one position to the other, keeping the agency from having to do two separate personnel actions. She acknowledged that under 101 KAR 2:096, Section 6, that the resigning employee is to give 14 days' notice or risk forfeiture of accrued annual leave, but that it is up to the agency to decide if it withholds the employee's accrued annual leave, and it is not required to document it with the Personnel Cabinet or withhold the annual leave.

14. Bailey testified that if the position sought to be filled is approved the agency can establish it at any time, but that nothing is official for any personnel action until it is approved by the Personnel Cabinet. She stated that the Personnel Cabinet determines the minimum qualifications for the position and whether certain candidates, such as veterans, have to be interviewed. The agency is free to pick and choose who they want to interview from the "Internal Mobility" applicants and the Personnel Cabinet does not mandate the agency use any particular criteria as to who they are going to interview. However, the Personnel Cabinet is notified as to the candidates interviewed. She said that each agency has analysts and consultants to resolve questions concerning a candidate.

15. Bailey testified that Compensation Plan is revised annually, which explains to the employees the differences in salary for employees who are in the same classification, but do not have the exact same factors. She said this is due to the fact that there are many career classifications with different salaries. She added that the compensation regulation concerning classified employees at 101 KAR 2:034, Section 1 and 2, says the appointing authority shall

adjust the salary up to the mid-point of the pay grade, that gives the authority for "Resign to Reappoint."

16. Bailey testified that "Resign to Reappoint" has been a long standing policy within the Personnel Cabinet, that there have been over 5,000 "Resign to Reappoint" hirings, and that the procedure is consistent with the regulations. She also pointed out KRS 18A.0751(4)(f) provides that promotions are to be made in the best interest of the service. She stated that it is up to the agency to determine the practicality of the process used and that all appointments go on a probationary status in their new position.

17. Phillip Noble is currently employed as a Safety Coordinator for the District 10 office in Breathitt County, where he was placed as a TET II in March 2015. He testified that, under the "Resign to Reappoint" procedure he went through, he did not consider that he experienced a time break in service where he was not considered a state employee, nor that it would affect his retirement. He said he applied for the position after being made aware of it by Elizabeth Miller in the District 10 office, as he was seeking more money. He said he accepted the position knowing he would receive a 5% raise, then another 5% raise after completing the probationary period. He testified that he was not aware that other TET II employees in Breathitt County would receive pay raises as a result of his promotion, and that he only learned about it "sometime afterwards." In January 2017 he was promoted to the position of Safety Coordinator, which was by "promotion."

18. Melissa Kessinger is currently employed with the Transportation Cabinet as a TET II for the District 3 office in Warren County. She testified that when she was placed in the position she was not advised as to why it had to be through a "Resign to Reappoint" procedure. She only knew she had to do so in order to get the position, that it would not cause her any break in service or affect her retirement, and that she only learned later that other employees would receive a pay increase.

19. Heather Wilson is currently employed as a TET III for District 6 in Boone County, effective March 1, 2015. She testified that she learned of the opening job opportunity from her boss, looked up the posting online, and applied for the position. She said that, after her interview, she was notified of her selection by email. She said she did not understand the technicality of "Resign to Reappoint," but she understood that she would have no break in service as a state employee. She stated that she was not aware at the time that other TET III employees would receive the same pay increase, and she had no objections to the other employees receiving the pay increase.

20. Steven Lanham is a TET III for District 10 in Powell County. He said he applied for the position while serving as a TET I, but he did not remember who told him he had been selected. He said that when he submitted the letter of resignation he understood that there would be no break in service, although signing his resignation made him uncomfortable, and that he would be on probation when appointed to the position.

21. **Jill Harmon** has been employed for the past eight years as an Administrative Coordinator for District 3 of the Transportation Cabinet, performing human resources functions involving personnel matters. She testified that when the opening for the TET II position in Warren County became available, it was initially listed for competitive applicants, but that it went through as a "Resign to Reappoint." She added that, at the time, they were processing a lot of "Resign to Reappoint" positions in order to increase wages in the District, which were approved. She said that by making the appointment in this manner the other TET IIs would get pay increases, but that the Chief District Engineer informed them that they would no longer be able to promote in this manner.

22. **Daryl Price**, Branch Manager in the Bowling Green office, **Jason Hurt**, Materials Section Supervisor in the Bowling Green office, and **Christopher Cox**, TET III in Bowling Green, each testified that the TET II and TET III promotions made in their counties were made by the "Resign to Reappoint" procedure in order to effect across the board salary increases in those positions in the counties involved.

23. **Charles Childers** is a TET III in the District 3 office in Bowling Green. He was employed in 2007 as a TET I. He said that he was told by Mr. Price that they would get pay increases. However, when Melissa Kessinger got her promotion to TET II, and the TET Is did not receive an increase in pay, he filed a grievance that he said went nowhere. He unsuccessfully appealed, which he stated undermined everything he was told that the merit system would protect. He complained that his salary was less than all the TET IIs in Warren County and that the TET IIIs got a significant increase in salary.

24. **Patrick Fitzgerald** is a TET III in the Materials Section in the District 3 office. His career mirrored that of Childers and the basis of his appeal is that his salary is lower and did not get increased when the other TET IIIs were promoted.

25. **Roy Allen** has been employed with the state for 13 years and has been a TET II since 2015. He stated that he was informed by Mark Hoskins that a plan was in place to increase the pay of TET IIs and TET IIIs.

26. **Jeffrey Crowder** has been a TET III in the District 11 office in Whitley County. He testified that he became aware from his engineering supervisor of a plan to increase salaries through a "Resign to Reappoint" promotion process, which get everyone across the board to the mid-point salary range. He stated that the plan did not go through and that he was told that the Personnel Cabinet determined they would no longer allow "Resign to Reappoint."

27. **Michelle Barnes** has been employed since November 16, 2017, with the Human Resources Department for the Justice and Public Safety Cabinet. She previously was the Assistant Director of Human Resources for the Kentucky Transportation Cabinet. In that role, she was involved in the hiring process review and approval, including making sure all required documentation was provided and justification for the hiring was present. She testified that their

office would communicate with the Personnel Cabinet to ensure that the candidate is qualified for the position being considered. She stated that the register is certified by the Personnel Cabinet making the determination on the qualifications of the candidate. She testified that the requisition for the position first goes to the State Highway Engineer before it went to Human Resources where it is reviewed internally. It would then be sent to the Personnel Cabinet where it would be posted. She said that they would inform the Personnel Cabinet as to whether the register was for a competitive or internal mobility placement. She testified that the register is then sent to the Highway District Human Resources Director, who wants to fill the position, for their review to make sure it is accurate.

28. Barnes said that the District Manager makes the salary decision and the Human Resources Director ensures the pay grade and any salary increase is in accordance with the regulations. She testified that if the Highway Department makes a new appointment, they have to look at the salaries of existing employees in the same pay grade in the same county. She said that they do an analysis by looking at the personnel files of existing employees impacted in the same county to see if they meet the same education and experience requirements to qualify for a pay increase. The Agency prepares a spreadsheet analysis comparison of the salaries, classifications, education, and years of experience, which is maintained in the Human Resources office. She testified that for a period of time they did a review to see if everybody in that classification got a pay increase, however, eventually the Personnel Cabinet made a determination across the board for all employees that led the Transportation Cabinet to stop processing pay increases for all employees.

29. Barnes testified that the process of comparing the salaries was to make a list of all employees in an affected classification in that county to see if anyone was below the salary set for the approved employee. If such a person was deemed below that salary, they would pull the employee's file to determine if they were entitled to a salary increase. She said she was not aware of it ever occurring that every employee got a pay increase regardless of their classification, education, and experience.

30. Barnes testified that "Resign to Reappoint" means that the individual being considered is currently an employee and that the Agency follows the personnel regulations for the respective salary of the position. She stated that there is no regulation that currently guides them on whether the request is to be treated as a promotion or a "Resign to Reappoint." She said it is all determined by the salary range which is based on the pay grade and the salary increase requested, which is determined by the District. If the salary requested cannot be done by the process of promotion, it has to be done by "Resign to Reappoint," which is a simultaneous transaction with no break in service. She said that the Agency has to figure out what salary is requested in order to determine the correct process for the hiring and that the type of action taken is dependent on meeting the salary requested for the position, not the other way around. She stated that this is done because retention of employees is a big issue within the Transportation Cabinet and it is necessary to keep salaries at appropriate levels.

31. Barnes testified that, when considering a candidate for promotion, the Agency always follows the guidelines required under 101 KAR 1:400 by considering an applicant's qualifications, record of performance, conduct, seniority, and performance evaluations in the selection of an employee for a promotion. She said this process is followed regardless of whether it was a promotional process or "Resign to Reappoint." Also, the candidate's classification potentially determines the way the hiring process is handled, as an unclassified applicant has to be appointed and not promoted. Barnes said that after the Agency receives the register, a list of the candidates they want to interview is sent to Human Resources, which is passed on to the Personnel Cabinet to determine their qualification to be interviewed.

32. Barnes reiterated that her duties were to oversee personnel, payroll, and benefits for the Transportation Cabinet. She said that in each case where a "Resign and Reappoint" placement was approved, she did an analysis of salary for the county involved. She testified that the state merit system does allow an employee to make a higher salary, than a higher graded employee, as salary is, somewhat discretionarily, based on education and experience and "the best interest of the government agency."

33. Barnes said there are 12 Highway Districts in the 120 counties within the Commonwealth of Kentucky, with each district headed by a Chief District Engineer. The work performed in each district across the state is not the same, and all requests for personnel action are based on the need in each district. Any placement made within a district still has to be within the authorized salary range.

III. FINDINGS OF FACT

1. Prior to the hearing, the parties through their attorneys entered into a joint stipulation into the record, establishing the following facts:

- (1) That the Appellants were from Clay and Warren Counties and that the Appellants from Warren County were all employed in the position of TET III.
- (2) That the five employees at issue under the "Resign to Reappoint" were: Phillip Noble promoted to TET II in Breathitt County, Melissa Kessinger promoted to TET II in Warren County, John Edwards promoted to TET II in Hardin County, Heather Walton promoted to TET III in Boone County, and Stephen Lanham promoted to TET III in Powell County.
- (3) The five "Resign to Reappoint" positions were filled by competitive registers.
- (4) The Personnel Action Notification (PAN) forms for each of the promotion actions reflect the "action type" as "Resign to Reappoint."

- (5) The Appellants did not apply to any of the five competitive registers for the positions that were eventually filled by Noble, Kessinger, Edwards, Walton, and Lanham.
- (6) None of the Appellants have ever worked in Breathitt County.
- (7) None of the Appellants have ever worked in Hardin County.
- (8) None of the Appellants have ever worked in Boone County.
- (9) None of the Appellants have ever worked in Powell County.
- (10) Melissa Kessinger worked as a TET II in Warren County. Appellants Charles Childress, Christopher Cox, and Patrick Fitzgerald worked as TET IIIs in Warren County.
- (11) Stephen Lanham and John Edwards were unclassified interim employees immediately preceding their appointments to the position in question.
- (12) As a result of the "Resign to Reappoint" action of Phillip Noble in Breathitt County, five other TET IIs working in Breathitt County received an increase in salary. No other TET IIs employed by the Transportation Cabinet received salary increases as a result of the Noble "Resign to Reappoint."
- (13) As a result of the "Resign to Reappoint" action of Melissa Kessinger to TET II in Warren County, eight other TET IIs working in Warren County received an increase in salary. No other TET IIs employed by the Transportation Cabinet received salary increases as the result of the Kessinger "Resign and Reappoint."
- (14) As a result of the "Resign to Reappoint" action of John Edwards to TET II in Hardin County, four other TET IIs working in Hardin County received an increase in salary. No other TET IIs employed by the Transportation Cabinet received salary increase as the result of the Edwards "Resign to Reappoint."
- (15) As a result of the "Resign to Reappoint" action of Heather Walton to TET III in Boone County, five other TET IIIs working in Boone County received an increase in salary. No other TET IIIs employed by the Transportation Cabinet received salary increases as the result of the Walton "Resign to Reappoint."

- (16) As a result of the "Resign to Reappoint" action of Stephen Lanham to TET III in Powell County, six other TET IIIs working in Powell County received an increase in salary. No other TET III employed by the Transportation Cabinet received a salary increase as a result of the Lanham "Resign to reappoint."
 - (17) A Transportation Engineering Study (authorized in 2014 by the Kentucky General Assembly, HB 236) was conducted and published, dated January 8, 2015.
 - (18) The job class specifications for TET II, job number 20001437, and TET III, job number 20001438, were in effect at the time of the five appointments in this case.
 - (19) The parties stipulated to the authenticity of the documents produced in discovery and introduced into evidence.
2. It is the discretionary call of the District Highway Engineer to select the hiring process to be followed within the Transportation Cabinet.
 3. The application process utilized by the Transportation Cabinet in this case with the five promotions at issue followed the statutory and regulatory requirements for the promotion criteria to be considered in the selection process, even though the placements were made through a "Resign to Reappoint" recommendation from the Chief District Engineer.
 4. The issue of salary increases from a promotion by "appointment" is governed by 101 KAR 2:034, which provides that an appointing of a new employee be at a salary not to exceed the midpoint of the pay grade, and that an adjustment be made to that salary of an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee: (a) is in the same job classification; (b) is in the same work county; and (c) has a similar combination of education and experience relating to the relevant job class specification. If the placement is by promotion, none of the other incumbent employees similarly situated will receive an increase in salary.
 5. There are twelve Highway Districts in the 120 counties within the Commonwealth of Kentucky, with each district headed by a Chief District Engineer. The work performed in each district across the state is not the same, and all requests for personnel action are based on the need in each district.
 6. A key factor considered by the Transportation Cabinet in their hiring and promotion process, concerns salary and its impact on retention problems, and that the state compensation plan is reviewed on an annual basis.

7. It is the policy of the Personnel Cabinet that "appoint/reappoint" are the same thing, as "Reappoint" is a term used by the Personnel Cabinet, and is actually an "appointment."

8. "Reappoint" means the employee has resigned from a classified position to be appointed to another position. There is no break in service from one position to the other, keeping the agency from having to do two separate personnel actions and offering employees an opportunity for a pay raise with no impact on retirement.

9. In any personnel action taken by an agency nothing is official for any personnel action until it is approved by the Personnel Cabinet.

10. All appointments go on a probationary status in their new position during which they can be terminated without cause within the first six months of the appointment.

11. There is no statewide mandate concerning the specific hiring process to be followed and that it falls within the discretion of each district hiring manager based on need, however, KRS 18A.0751(4)(f) provides that promotions are to be made in the best interest of the service.

IV. CONCLUSIONS OF LAW

1. KRS 18A.030(2) provides, in pertinent part, that the Secretary of the Personnel Cabinet shall:

(c) Establish general procedures for personnel recruitment, for certification, and for improving the efficiency of employed personnel;

(g) Make certification for appointment or promotion within the classified service, in accordance with the provisions of KRS 18A.005 to 18A.200;

2. KRS 18A.0751 provides that the Personnel Board shall promulgate comprehensive administrative regulations for the classified service governing various employment actions, including promotion, reinstatement, and transfer. The statute further provides instructions as to the manner in which promotions are to be considered, stating at subsection (4)(f), that the agency considering the promotion:

... shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter, vacancies shall be filled by promotion whenever practicable and in the best interest of the service ...

3. KRS 344.100 provides that discrimination in wages or conditions is not unlawful when made on a basis other than race, color, religion, national origin, sex, age forty and over, or because person is a qualified individual with a disability.

4. 101 KAR 1:400 provides for the handling of promotions, stating in Section 1 that "Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority, and performance evaluations in the selection of an employee for a promotion."

5. 101 KAR 2:034 establishes requirements to assure uniformity and equity in administration of the pay plan in accordance with statutory requirements, and states in Section 1:

New Appointments.

(1) An appointing authority shall appoint a new employee at a salary not to exceed the midpoint of the pay grade.

(2) The appointing authority shall adjust to that salary an employee who is earning less than the new appointee's salary, if the appointing authority determines that the incumbent employee:

(a) Is in the same job classification;

(b) Is in the same work county; and

(c) Has a similar combination of education and experience relating to the relevant job class specification

6. 101 KAR 2:076 (1) concerns the filling of vacancies, and directs that "A vacancy in the classified service shall be filled by appointment, demotion, promotion, reemployment, reinstatement, reversion, or transfer."

7. KRS 18A.005(24) defines "penalization" as follows:

'Penalization' means demotion, dismissal, suspension, fines, and other disciplinary actions; involuntary transfers; salary adjustments; any action that increases or diminishes the level, rank, discretion, or responsibility of an employee without proper cause or authority, including a reclassification or reallocation to a lower grade or rate of pay; and the abridgment or denial of other rights granted to state employees.

8. KRS 18A.005(26) defines "promotion" as follows:

'Promotion' means a change of rank of an employee from a position in one (1) class to a position in another class having a higher minimum salary or carrying a greater scope of discretion or responsibility."

9. KRS 18A.005(27) defines "probationary promotion" as follows:

'Promotional probation' means the period of service, consistent with the length of the initial probationary period, following the promotion of an employee with status which must be successfully completed in order for the employee to retain the position to which he has been promoted. If the employee is granted leave in excess of twenty (20) consecutive work days during this period, his promotional probation shall be extended for the same length of time as the granted leave to cover such absence.

10. KRS 18A.111(4) provides:

An employee with status, who has been promoted, shall serve a promotional probationary period of six (6) months, except for those employees granted leave in excess of twenty (20) consecutive work days during this period. Such probationary periods shall be extended as prescribed in KRS 18A.005. During this period, he shall retain the rights and privileges granted by the provisions of this chapter to status employees.

11. Kentucky law makes it clear that an administrative agency is prohibited from acting in an arbitrary manner by Sec. 2 of the Kentucky Constitution. *Pritchett v. Marshall*, 375 S.W.2d 253 (Ky. 1964); *Wagoner v. Blair Fork Coal Co.*, 534 S.W.2d 250 (Ky. 1976); *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982); *Bunch v. Personnel Bd., Com. of Ky.*, 719 S.W.2d 8 (Ky. App. 1986).

12. The Appellants argue that the Transportation Cabinet and the Personnel Cabinet misused, manipulated, and otherwise circumvented the laws by using an unauthorized procedure known as "Resign to Reappoint," through which they arbitrarily denied similar pay raises to all the other TET II and TET III employees throughout the state. In essence, they argue that since the procedure of "Resign to Reappoint" is not specifically conferred by law, it must be excluded. They argue that under 101 KAR 2:076(1), the term "Probationary Appointment" clearly "means the hiring of a new employee for the first time off of the street who is not a current employee of the state government," and that under KRS 18A.111(1), such probationary period occurs when he is initially appointed to the classified service. They describe the hiring process as a "scheme" and a "sham" used by the Transportation Cabinet as a "subterfuge" to give other employees unauthorized pay raises they would have not otherwise been entitled to receive, and that the

Transportation Cabinet, with the assistance of the Personnel Cabinet, "contorted" the law to accomplish that goal.

13. The uncontradicted testimony of Jolene Parris, Executive Director of the Office of Human Resources Management for the Transportation Cabinet, and Mary Elizabeth Bailey, the Commissioner of the Department of Human Resources Administration in the Personnel Cabinet, is that "Resign and Reappoint" is a term used by the Personnel Cabinet, and is actually an "appointment." Even though the term "reappoint" is not contained in the statutes, it is the policy of the Personnel Cabinet that "appoint/reappoint" are the same thing, although there is no statute that states this. Further, the statutes and regulations provide no preference for the hiring method to be used.

14. The uncontradicted testimony from Mary Elizabeth Bailey, the Commissioner of the Department of Human Resources Administration in the Personnel Cabinet, is that this procedure has been used before for other promotions. However, it is the call of the District Highway Engineer to select the hiring process to be followed, although the Human Resources Management office reviews all the information on the job placement request and may comment on the procedure selected. She said that the state personnel office had no problem with the "Resign to Reappoint" procedure, that the request for "Resign to Reappoint" has been a long standing policy within the Personnel Cabinet, that there have been over 5,000 "Resign to Reappoint" hirings within the state agencies, and that the procedure is consistent with the regulations. Bailey also pointed out KRS 18A.0751(4)(f) provides that promotions are to be made in the best interest of the service, and that it is up to the agency to determine the practicality of the process used. Finally, she testified that all appointments go on a probationary status in their new position.

15. KRS 18A.111(4) provides that a promotional probationary period shall be served by an employee with status, who has been promoted, for a period of six (6) months. Additionally, KRS 344.100 allows for different compensation payment for state employees in the same classification. The Personnel Board has previously held that the wage disparity complained of by the Appellants is the by-product of KRS Chapter 18A merit and seniority systems. *Kathryn Parrish v. Office of the Attorney General*, 2014 WL 2191021 (Ky. PB 5/14/14). The Personnel Board has further held that there is no regulation or statute which provides that similarly situated or classified employees of the Commonwealth are to be paid at the same wage rate. *George Fortune v. Cabinet for Health and Family Services*, 2008 WL 4329627 (Ky PB 8/13/08).

16. Recently, while this case was pending, the Kentucky Personnel Board ruled in another matter involving the Transportation Cabinet and the Personnel Cabinet, which challenged the legality/propriety resign/reappoint personnel actions. The Personnel Board upheld the agencies' discretion to utilize the "Resign to Reappoint" procedure. *Scott Huddleston et al. v. Transportation Cabinet and Personnel Cabinet*, 2018 WL 4037967 (Ky. PB 7/18/18). See also *Stephen Eastin v. Tourism, Arts and Heritage Cabinet, Department of Parks*, 2016 WL

3227508 (Ky. PB 5/19/16); *Reda Darlene Heflin v. Justice and Public Safety Cabinet, Department of Juvenile Justice*, 2013 WL 1281658 (Ky. PB 3/13/13); *Denver Bright v. Transportation Cabinet*, 1992 WL 12597928 (Ky. PB).

17. The Appellants argue that the "Resign and Reappoint" is a made up and unauthorized procedure and that, unless the right for the action taken by the state agency is specifically conferred upon it by law, the Agency has no "inherent authority" to exercise such procedure. To support their argument, the Appellants' cite *Herndon v. Herndon*, 139 S.W.3d 822 (Ky. 2004) and the unreported case of *Continuing Care Hospital at St. Joseph East v. Commonwealth*, (Ky. App. 2014), Unpub. LEXIS 888. *Herndon* involved a domestic relations matter in which the Appellant appealed the trial court entering an order adopting a settlement agreement that the Appellant had refused to sign as an order of the court. The matter was referred to a Domestic Relations Commissioner who conducted a hearing without the presence of the Appellant or his attorney. Notably, Appellant's counsel, who just prior to the hearing, learned that it was scheduled for that morning instead of the afternoon. Appellant's counsel notified the court that he had just learned the time of the hearing, but would be present. Appellant's counsel arrived 15 minutes late only to learn an order had been entered accepting the settlement agreement. Appellant timely appealed to the Court of Appeals from Order of the trial court, but the Court of Appeals dismissed Appellant's appeal on the grounds that no objection to the order was entered in the trial record. On appeal to the Supreme Court, the Appellee relied on a case reviewing on an administrative law appeal that held failure to file exceptions to the report of the hearing officer constituted a failure to exhaust his administrative remedies, thereby precluding review by the court. The Supreme Court stated that the key to the issue was the authority of the tribunal. The Court acknowledged that Executive Branch agencies or administrative agencies have no inherent authority and may exercise only such authority as may be legislatively conferred. The court ruled CR 61.02 recognizes that a party's appellate rights may be circumscribed but maintains an avenue of relief by an appellate court even when the error may have been insufficiently raised or preserved for review. Specifically, that a palpable error affecting the substantial rights of a party, even if insufficiently raised or preserved, is reviewable, and, upon a determination that it has resulted in manifest injustice, is reversible. The case fails to give any guidance on the state personnel laws concerning the hiring process.

19. The unreported case of *Continuing Care Hospital (CCH)* involved an appeal to the Kentucky Court of Appeals of a determination by the Cabinet for Health and Family Services to reduce the Medicaid per diem rate. A dispute resolution meeting was conducted, which upheld the determination, as did a subsequent administrative hearing, and a review in the circuit court. The Kentucky appellate court ruled that, while reasonable persons may disagree about the Cabinet's reimbursement methodology in the case, there was no showing that the methodology is vague or its application is so vague or its application so arbitrary that it violates constitutional standards.

20. Lastly, the Appellants raise the curious argument that they are not claiming that they are entitled to pay raises as a result of the "legitimate" filling of the TET II and TET III vacancies, but instead are claiming that the personnel laws were manipulated by using the unauthorized procedure of "Resign to Reappoint" in an arbitrary manner to give employees in the counties involved pay raises that they would not have otherwise received. As a result, the Appellants then claim entitlement to pay raises arguing they were penalized because they were deprived of the pay raises.

21. The evidence of record establishes that the "Resign to Reappointment" process is within the discretionary appointment authority of the agencies, under the power legislatively granted under KRS 18A.0751. This Hearing Officer takes sufficient notice of the evidence of record and notes that there is substantial evidence that the placements objected to by the Appellants were made as authorized by law, which has previously been upheld by this Personnel Board. Under KRS 18A.115(1), all positions within state government are part of the classified service unless specifically excluded and are subject to personnel laws governing classified service. Under the procedure outlined in 101 KAR 2:066, an agency seeking to fill a vacant position must request a certified register of classified employees who are qualified for the position from the Personnel Cabinet. Upon receipt of the request, the Personnel Cabinet must certify a list of all internal mobility candidates already employed by the state government as well as eligible applicants with the five (5) highest scores who have applied for the vacant position, if applicable. The agency then selects a person from the list of eligibles and informs the Personnel Cabinet of the selection. *Com. Educ. & Humanities Cabinet Dept. of Educ. v. Gobert*, 979 S.W.2d 922, (1998). There is substantial evidence that the Transportation Cabinet and the Personnel Cabinet complied with the law of the Commonwealth of Kentucky.

22. The Appellants argue their case well, but fail to recount the facts of the process utilized by the Transportation Cabinet of the filling of the positions, and fail to vindicate their reasoning that they were penalized by not receiving a pay raise. Essentially, they argue "equal work for equal pay" across the board. However, in reviewing the law of the Commonwealth, state agencies are empowered under KRS 18A.0751 with discretion in processing personnel actions whenever practicable and in the best interest of the service of its obligations to the people of the Commonwealth of Kentucky. Furthermore, according to the dictates codified in 101 KAR 2:034, in order for an employee to receive "similar pay for similar work," the employees must meet certain conditions: (1) that they are employed in the same job classifications, (2) they are working in the same county, and (3) that they have a similar combination of education and experience relating to the relevant job class specifications. None of the Appellants meet these limiting conditions.

23. The Appellants fail to articulate they were arbitrarily harmed and penalized by the personnel actions in issue processed under the authority of KRS 18A.0751(4)(f) and the regulation at 101 KAR 2:034. The preponderance of the evidence establishes that the Transportation and Personnel Cabinets complied with their obligations under Kentucky law. None of the actions taken meet the definition of "penalization" at KRS 18A.005(24). It is not

within the jurisdiction of the Personnel Board to second guess the wisdom of a personnel decision made by an agency.

V. RECOMMENDED ORDER

Having considered and weighed all the evidence and the laws of the Commonwealth of Kentucky, and based upon the foregoing Findings of Fact and Conclusions of Law, it is the recommendation of the Hearing Officer that the Personnel Board enter an Order that the appeals of **MICHAEL L. FROST (APPEAL NO. 2015-143) (WITHDRAWN)**, **CURTIS MCKIDDY (APPEAL NO. 2015-145)**, **DON NOLAN (APPEAL NO. 2015-147)**, **CRAIG A. NAPIER (APPEAL NO. 2015-153)**, **ROY G. ALLEN (APPEAL NO. 2015-154)**, **ROBBIE D. HATCHER (APPEAL NO. 2015-155)**, **SHANNON R. SMITH (APPEAL NO. 2015-157)**, **GENE S. GREGORY (APPEAL NO. 2015-160)**, **JEFFREY A. CROWDER (APPEAL NO. 2015-159)**, **JOHN R. FARMER (APPEAL NO. 2015-144)**, **PATRICK FITZGERALD (APPEAL NO. 2015-243)**, **CHRISTOPHER COX (APPEAL NO. 2015-245)** and **CHARLES CHILDRESS (APPEAL NO. 2015-247)** be **DISMISSED** and that said appeals be removed from the docket, as it is the conclusion of this Hearing Officer that the probationary promotional placements in issue under "Resign to Reappoint" met the statutory and regulatory requirements of the Commonwealth of Kentucky.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of Hearing Officer E. Patrick Moores this 11th day of July, 2019.

KENTUCKY PERSONNEL BOARD



MARK A. SIPER
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Richard M. Guarnieri
Hon. Paul F. Fauri
Hon. Edwin Logan
Hon. Catherine M. Stevens
Hon. Rosemary Holbrook
Mr. J. R. Dobner